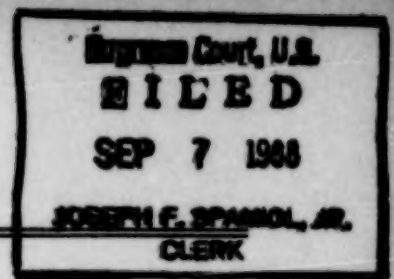


②  
No. 88-161



In The  
**Supreme Court of the United States**  
October Term, 1988

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COMMONWEALTH OF PENNSYLVANIA,  
*Petitioner,*  
vs.  
THOMAS A. BRUDER, JR.,  
*Respondent.*

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**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF PENNSYLVANIA**

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether compelling a motorist to recite the alphabet for the purpose of producing testimonial or communicative evidence to determine guilt without any warnings of the individual's rights against self-incrimination is violative of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether a motorist who reasonably believes his freedom of action is being restricted by a police interrogation must be warned of his rights against self-incrimination pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

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## OPINIONS BELOW AND JURISDICTION

Respondent is satisfied with the Petitioner's presentation of the opinions below and grounds on which they seek to invoke the jurisdiction of this Court.

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## CONSTITUTIONAL PROVISIONS INVOLVED

Respondent is satisfied that Petitioner has set forth the applicable constitutional provisions involved.

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## STATEMENT OF CASE

On January 19, 1985, at approximately 12:50 a.m., Patrolman Steve Shallis of the Newtown Township Police Department observed the Respondent's vehicle momentarily stopped at a green light. (N.T. December 17, 1985, p.8) Thereafter, Respondent proceeded down a four-lane highway. Respondent then made a right-hand turn onto a two lane road. While on the two lane road, Patrolman Shallis activated the red grill lights and the red dash light of his police vehicle. In response thereto, Respondent stopped his vehicle on the shouler of the road. (*Id.* at 11-12) In response to Patrolman Shallis, Respondent produced his driver's license. While Respondent was looking for his registration card within his glove compartment, Patrolman Shallis demanded Respondent step out of his vehicle. Patrolman Shallis then pointedly asked the Respondent whether he had consumed any alcoholic beverages. In response thereto, Respondent stating he "had a couple of drinks". (*Id.* at 14)



Respondent was then ordered by Patrolman Shallis to undergo field sobriety tests in the form of a walk-the-line and alphabet recitation test. (*Id.* at 14-15) Patrolman Shallis then placed Respondent under arrest for operating a vehicle under the influence of alcohol and/or a controlled substance. Thereafter, Respondent was placed into the back of a marked Newtown Township Police Vehicle and read his *Miranda* rights for the first time. (*Id.* at 16)

Respondent concurs with Petitioner's recitation of the procedural history of this case.

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## REASONS FOR DENYING REVIEW ON CERTIORARI

### I. COMPELLING A MOTORIST TO RECITE THE ALPHABET FOR THE PURPOSE OF PRODUCING TESTIMONIAL OR COMMUNICATIVE EVIDENCE TO DETERMINE HIS GUILT WITHOUT ANY WARNINGS OF HIS RIGHTS AGAINST SELF-INCRIMINATION VIOLATES THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The conclusion within the Petition that the Pennsylvania Superior Court's decision in *Commonwealth v. Bruder*, 365 Pa. Super. Ct. 106, 528 A.2d 1385 (1987) is in direct conflict with the decisions of *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed. 2d 67 (1973), *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967) and *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966) is illusory. The decisions in *Dionisio*, *Wade*, and *Schmerber* are clearly distinguishable from the instant case and are not applicable to

custodial interrogations when testimonial or communicative evidence is obtained therefrom. The *Wade* decision addressed certain legal issues surrounding a post-indictment line-up, the *Dionisio* decision reviewed the legal issue of the use of a Grand Jury subpoena to obtain a voice exemplar to compare with recorded conversations that had been received by the Grand Jury into evidence, and the *Schmerber* decision involved the withdrawal of blood from a suspect and the admission of the blood analysis into evidence.

In *Wade*, this Court concluded that the defendant was entitled to counsel at a pre-trial line-up since it was a critical stage of the prosecution. In order to avoid the great potential for prejudice and protect against overreaching, either intentional or unintentional, during the line-up process, the defendant's rights were to be insured by the right to have counsel during the line-up. This Court further concluded in *Wade*, the defendant's rights under the Fifth Amendment were not violated when he had to utter words for purposes of identifying his voice. The Court was emphatic in concluding that the compulsion to utter statements were *not* of statements that were testimonial in nature. Such statements were not introduced into evidence against him. Specifically, this Court in its holding concluded:

Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything *Wade* said or did at the line-up which implicates his privilege. The Government offered no such evidence as part of its case, and what came out about the line-up proceedings on *Wade's* cross-examination of the bank employee involved no violation of *Wade's* privilege. 388 U.S. at 223.

In the instant case, the Respondent's utterances of the alphabet were testimonial in nature and were in fact admitted into evidence to demonstrate what he said and did implicating his privilege. The defendant's actual communications spoke of his guilt when he recited the alphabet.

In *Dionisio*, the witness was compelled to produce a voice exemplar. However, this procedure was cloaked with the presence of counsel to assure the integrity of the process for obtaining his voice exemplar. Additionally, the statements were made only for purposes of voice comparisons; *the voice exemplars were not going to be introduced into evidence*. As stated by this Court: "the voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for testimonial or communicative content of what was to be said." 410 U.S. at 7

In *Schmerber*, this Court held that withdrawal of blood from a defendant and the admission of the blood analysis into evidence did not violate the defendant's rights against self-incrimination. This Court, in its analysis of the Privilege Against Self-Incrimination Claim, concluded:

Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privileged grounds. 384 U.S. at 765.

This Court in *Schmerber* reaffirmed that "the protection of the privilege reaches an accused's communication, whatever form they might take, and the compulsion of

responses which are also communications." 384 U.S. at 763-764.

The privilege against self-incrimination is "a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect an accused the source of 'real or physical evidence' does not violate it". 384 U.S. at 764.

This Court noted the difficulty in determining whether evidence is communicative or testimonial versus real or physical evidence and that a distinction must be drawn in an analysis of the evidence being obtained from a defendant. This Court observed:

Some tests seemingly directed to obtain 'physical evidence', for example lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. *To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.* (Emphasis Added.) 384 U.S. at 764.

In *Schmerber* there was no testimonial compulsion at all involved in the extraction of blood from the defendant.

It is submitted that both *Wade* and *Dionisio* are clearly distinguishable in that the testimonial or communicative content of the individuals' statements in both cases was not itself introduced into evidence. In *Schmerber*, there was in fact no statements made by the defendant. In the instant case, the Petitioner, to establish the defendant's guilt introduced into evidence the testimonial or communicative content of what the Respondent stated in reciting



the alphabet. More importantly, Respondent was not afforded the right to counsel.

Reciting the alphabet was not a test designed to elicit real or physical evidence to be introduced against the defendant. Rather, the recitation of the alphabet was clearly communicative and testimonial by its very nature and the content of said statement was introduced into evidence to be considered as evidence in determining the defendant's guilt or innocence.

The jury in the *Bruder* case was hearing utterances of the defendant and how he recited the alphabet and other utterances during the recitation of the alphabet which were being weighed by the jury to determine his guilt or innocence and not merely to determine, in the form of a test, whether his faculties were impaired, such as observing him walk. The introduction of the utterances of Respondent was not "physical evidence", it was in fact testimonial by its very nature.

The Superior Court of Pennsylvania concluded that under Pennsylvania Law in the instant case the recitation of the alphabet was communicative or testimonial in nature.

**II. A MOTORIST WHO REASONABLY BELIEVES HIS FREEDOM OF ACTION IS BEING RESTRICTED BY POLICE INTERROGATION MUST BE WARNED OF HIS RIGHTS PURSUANT TO THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

The Pennsylvania Superior Court correctly concluded that the roadside questioning of a motorist

detained pursuant to a traffic stop constitutes custodial interrogation, for the purposes of the *Miranda* Rule, if the motorist is physically deprived of his freedom in any significant way, or is placed in a situation in which he reasonably believes his freedom of movement is restricted by such interrogation. This conclusion is in harmony with *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed. 2d 317 (1984), wherein this Court held the following:

If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protection prescribed by *Miranda*. 468 U.S. at 335.

*Commonwealth v. Meyer*, 488 Pa. 297, 412 A.2d 517 (1980) was properly relied upon by the Superior Court of Pennsylvania for the legal proposition that the roadside questioning of a motorist detained pursuant to a traffic stop constitutes custodial interrogation, for the purposes of the *Miranda* Rule, if the motorist reasonably believes that his freedom of action is restricted by such interrogation. *Commonwealth v. Meyer, supra* at 521. As correctly decided by the Superior Court in both the case at bar and in *Meyer, supra*, the evidence clearly indicated that the motorist reasonably believed his freedom of action had been restricted and statements elicited before he received his *Miranda* warnings were properly suppressed. The Superior Court correctly observed that this Court has recognized the validity of the *Meyer* decision in its analysis of the facts in *Berkemer v. McCarty, supra* at 441, N.34. Specifically, the Superior Court concluded:

As in the case at bar, the driver in *McCarty* was stopped after being suspected of driving under the

influence of alcohol, admitted that he had had a few drinks, and failed a balancing test before being advised of his *Miranda* rights. The Court in *McCarty*, however, refused to adopt a bright line test which would have definitively answered the question of whether *Miranda* applied to all traffic stops or whether a suspect need be advised of his rights only when he is formally placed under arrest. 468 U.S. at 441. Thus, we are afforded a measure of flexibility in deciding exactly when a suspect has been taken into custody

....

[W]e conclude that Bruder's response that he had been drinking should have been excluded as a statement made during custodial interrogation without the benefit of *Miranda* warnings. *Meyer*, 488 Pa. at 307, 412 A.2d at 522. See generally *McCarty*, 468 U.S. at 441 N.34 (United States Supreme Court cites *Meyer* in connection with discussion which intimates that duration of and circumstances surrounding traffic stop impact on the determination of whether there was custodial interrogation for purposes of providing *Miranda* warnings).

528 A.2d at 1387-1388.

Based on the foregoing, the reasoning and ultimate holding of the Superior Court in the instant case is in harmony with the United States Supreme Court's decision in *Berkemer v. McCarty*, *supra*, and the Pennsylvania Supreme Court's decision in *Commonwealth v. Meyer*, *supra*.

Contrary to the Petitioner's conclusion, it is submitted that the Pennsylvania Superior Court followed the rationale of *Berkemer v. McCarty*, when it stated that the Supreme Court of the United States refused to adopt a bright line test which would have definitively answered

the question of whether *Miranda* applied to all traffic stops or whether a suspect need be advised of his rights only when he is formally placed under arrest. Accordingly, the Superior Court concluded:

"In Pennsylvania, 'custodial interrogation does not require that police make a formal arrest, nor that the police intend to make an arrest . . . Rather, the test of custodial interrogation is whether the individual being interrogated reasonably believes his freedom of action is being restricted.' (Citations omitted)" *Commonwealth v. Bruder*, 528 A.2d at 1387.

The Superior Court relied on a line of Pennsylvania cases interpreting and defining the meaning of custodial interrogation. Since this Court has left to the State Courts the opportunity to define custodial interrogation for purposes of *Miranda*, it is submitted that this Court should not redefine custodial interrogation for the State of Pennsylvania, unless this Court wishes to conclude that the application of *Miranda* does not apply to traffic stops or unless a suspect is formally placed under arrest.

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**CONCLUSION**

For the foregoing reasons, Respondent requests that the Petition for a Writ of Certiorari to the Pennsylvania Supreme Court be denied.

Respectfully submitted,

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